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IN THE

Supreme Court of The United States

October Term, 1974

NO. 73-1103

PHILIP JAMES GRAZIANI,
Petitioner,

v.

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on December 17, 1973.

OPINION BELOW

The opinion below was rendered, in a disciplinary proceeding, by the Supreme Court of Appeals of West Virginia and the case is unofficially reported in 200 S. E. 2d 353. Both the order denying the petition for

appeal and the order denying a rehearing, together with the opinion in the original appeal, are set forth in full in the Appendix herein.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on December 17, 1973, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether the Court below violated petitioner's federal constitutional right to due process by finding the petitioner guilty of bribery and conspiracy on the sole basis of his immunized grand jury testimony and, further, by allowing such compelled testimony to be used against petitioner as the sole grounds for disbarment.

2. Whether compelled testimony, by an attorney-witness before a grand jury, can be used against him as the sole basis of a disbarment proceeding, notwithstanding a court ordered grant of full and complete immunity applying to any proceeding against such attorney thus violating his right against self-incrimination.

3. Whether a disbarment proceeding poses sufficient threat of forfeitures and penalties to be one of those types of proceedings against a person contemplated by the grant of full immunity necessarily required to satisfy the broad protections of the Fifth Amendment right against self incrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Fifth Amendment

"No person . . . shall be compelled in any criminal case to be a witness against himself."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . to be confronted with the witnesses against him".

Ninth Amendment

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

West Virginia Statutes

Chapter 57, Article 5, Section 1, West Virginia Code, 1931, as amended.

"In any criminal proceeding no person shall be excused from testifying or from producing documentary or other evidence upon the ground that such testimony or evidence may criminate or tend to criminate him, if the court in which he is examined is of the opinon that the ends of

justice may be promoted by compelling such testimony or evidence. And if, but for this section, the person would have been excused from so testifying or from producing such evidence, then if the person is so compelled to testify or produce other evidence and if such testimony or evidence is self-criminating, such self-criminating testimony or evidence shall not be used or receivable in evidence against him in any proceeding taken against him thereafter taking place other than a prosecution for perjury in the giving of such evidence, and the person so compelled to testify or furnish evidence shall not be prosecuted for the offense in regard to which he is so compelled to testify or furnish evidence, and he shall have complete legal immunity in regard thereto."

STATEMENT OF THE CASE

On November 20, 1973, the West Virginia Supreme Court of Appeals issued its opinion, upon the petition of the respondent, the Committee on Legal Ethics of the West Virginia State Bar, annulling petitioner's license to practice law in the State of West Virginia. The opinion basically held that the testimony of the petitioner given before a grand jury under a grant of immunity could be used against him in a disbarment proceeding.

Thereafter, petitioner applied for a rehearing. On December 17, 1973 the petition for rehearing was denied, the record in the case at bar discloses the following facts:

In the months of November and December, 1969, petitioner had conferences with Patrick Casey, the Prosecuting Attorney for Kanawha County, West Virginia, Charles L. Hughes, who was a member of the

Department of Public Safety of West Virginia, and John T. Coyne, Chief Investigative Attorney for the Purchasing Practices and Procedures committee of the State of West Virginia.

During such conferences petitioner volunteered to furnish information that would aid and assist the State of West Virginia and the United States Government authorities in investigations concerning possible charges against certain officials. Definite promises were made to the petitioner by Mr. Casey as well as Mr. Hughes and Mr. Coyne that nothing said or furnished of any evidentiary nature by the petitioner would be used against the petitioner *in any shape or form.* Also during these conferences assurances were made to the petitioner that he would be given immunity by the Intermediate Court of Kanawha County, West Virgnia, with respect to such information and was further assured that no evidentiary matters traceable to any statements or evidence given by the defendant would be held against him.

Assurances were specifically made to Mr. Graziani that *no penalty or forfeiture or civil obligations would arise by reason of the information furnished by him.* (Emphasis supplied).

On December 10, 1969, the petitioner was summoned to appear before the Grand Jury of Kanawha County, West Virginia, and was compelled to give evidence after the court signed and entered an order granting petitioner immunity. The pertinent part of this order is as follows:

> "And it is further ORDERED that the said Philp Graziani shall have complete legal immunity in regards thereto as the law provides

and *said Philip Graziani is hereby granted full and complete immunity from prosecution under Federal or State laws* insofar as the matter being investigated by said grand jury are concerned, and insofar as any testimony he gives incriminates or tends to incriminate said Philip Graziani, and it is further ORDERED that as a result of such testimony and/or production of records *said Philip Graziani shall not be prosecuted or subjected to any penalties or forfeiture* for on account of any transaction, matter or thing concerning which he is compelled to testify *and said testimony shall not be used as evidence in any proceedings against the said Philip Graziani in any Court either State, Federal or otherwise.*" (Appendix D) (Emphasis supplied).

Thereafter, the respondent herein filed a petition in the United States District Court for the Southern District of West Virginia requesting the Court to authorize the testimony of the petitioner and Arthur J. Tarley given before a Federal Grand Jury in 1971, be disclosed to the respondent. Respondent allegedly desired such testimony as it related to possible incriminating evidence against the petitioner herein, for the "purposes preliminary to disbarment proceedings to be instituted against the said Philip James Graziani." (Committee Exhibit 2 in the Disciplinary Proceedings). In the answer to this petition petitioner alleged his immunity granted by the Intermediate Court of Kanawha County and further averred that "under the circumstances herein involved petitioner (complainant) is not entitled to the grand jury minutes as requested in that granting said relief would violate the constitutional rights of respondent (defendant)." (Answer to Petition in Federal Proceeding).

By order dated March 16, 1973, the United States District Judge ordered the United States District Attorney for the Southern District of West Virginia to disclose and make available to respondent the requested federal grand jury testimony.

At the subsequent disciplinary proceedings, held on May 3, 1973, no evidence was taken on behalf of the defendant for two reasons: First, petitioner's counsel was assured by the Chairman of the Legal Ethics Committee, that the respondent intended to rely solely upon the federal grand jury testimony, and secondly, in view of that assurance, defendant only specially appeared at the disciplinary proceeding in order to object to the constitutional violations involved in the proceedings. A special appearance and decision not to introduce evidence by the petitioner was a course taken to avoid any possible implications or conclusions that the petitioner had waived any constitutional errors incurred by the illegal use of the grand jury testimony by complainant. (Motion and Answer of Ethics Committee in Federal Petition; Disciplinary Hearing Transcript, pp. 7, 8).

There is and was no issue of fact as to whether or not the respondent used petitioner's compelled grand jury testimony against him in a disciplinary proceeding.

Thereafter, in July, 1973, respondent, based solely upon the evidence obtained in the grand jury minutes, instituted a disciplinary proceeding, in the Supreme Court of Appeals of West Virginia, seeking to annul petitioner's license to practice law. The petitioner, at that proceeding, continued to assert the basic defense of constitutional immunity against any proceeding

against him based upon compelled testimony. Petitioner has at no point, in his long, arduous assertion of Fifth Amendment rights, retreated from the position that the respondent was constitutionally barred from taking the actions it did. As stated earlier, the court below did, in fact, annul the petitioner's license to practice law finding him "guilty of bribery and conspiracy to commit bribery" (Appendix, A-12.) even though petitioner has never been charged nor convicted for any crime whatsoever.

Finally, the record below contains certain affidavits, of various federal and state law enforcement officials, which state clearly the broad grant of immunity herein. These affidavits are set forth in the Appendix and will be referred to in the following portion of this petition.

REASONS FOR GRANTING THE WRIT

1.

The Decision Below Erroneously Concluded that the Petitioner was Guilty of Bribery and Conspiracy to Commit Bribery on the Basis of Petitioner's Immunized Grand Jury Testimony and Then Utilized this Finding to Justify Disbarment Although Petitioner Has Never Been Charged or Tried for Such offenses.

On Page 10 of the opinion below the Court held as follows:

> "The testimony before the federal grand jury which is made a part of the record in this proceeding clearly shows that *the defendant was guilty of bribery and conspiracy to commit bribery.* It has repeatedly been held that such crimes are crimes that involve moral turpitude

> *which warrant the disbarment of any attorney guilty of such crimes. . . . Thus, the testimony of the defendant in this case before the grand jury amounts to a confession of guilt of a crime . . .*" (Appendix A-12) (Emphasis supplied).

Petitioner has never been charged, indicted or tried for the alleged offenses stated in the court's findings. The court below has summarily declared petitioner guilty of a felony in utter disregard of federally protected rights to confrontation of witnesses, to offer evidence on one's own behalf, to trial by jury and, most pointedly, the right against self incrimination.[1]

Applying the basic premise that due process embodies and contemplates the basic rudiments of fair play, *Hannah v. Larche*, 363 U. S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960), we find that petitioner was denied even the semblance of justice.

The uncontroverted evidence in this case is that Philip J. Graziani was summoned to appear before the Kanawha County Grand Jury on December 10, 1969, after entry of an order which reads, in pertinent part, as follows:

> "*. . . it is further* ORDERED *that as a result of such testimony and/or production of records said Philip Graziani shall not be prosecuted or subjected to any penalties or forfeiture for on*

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[1]The Supreme Court of Appeals below based its finding primarily upon the 1917 case of *In Re Ronan*, 221 N. Y. 81, 116 N. E. 782. As will be discussed more fully herein in the *Ronan* case was decided long before the modern cases of *Spevak v. Klein*, 385 U. S. 511, 87 S. Ct. 625 (1967) and *In re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222 (1968). *Ronan* does not contemplate the modern view that Fifth Amendment protections apply to disciplinary proceedings.

> account of any transaction, matter or thing concerning which he is compelled to testify and *said testimony shall not be used as evidence in any proceedings against the said Philip Graziani in any Court either State, Federal or otherwise.*" (Emphasis supplied).

This order was predicated, *inter alia*, upon West Virginia Code, 57-5-2, as amended, which provides, in part, that:

> ". . . self-criminating testimony or evidence shall not be used or receivable in evidence against him *in any proceeding* thereafter taking place . . . and he shall have *complete legal immunity* in regard thereto." (Emphasis supplied).

West Virginia Code, 57-5-2, as amended, is the immunity statute in West Virginia and by its own terms offers a rather broad[2] complete protection consistent with Fifth Amendment requirements. The pertinent part of that section follows:

> ". . . such self-criminating testimony or evidence shall not be used or *receivable in evidence against him in any proceeding taken against him* thereafter taking place other than a prosecution for perjury in the giving of such evidence, and the person so compelled to testify or furnish evidence, *and he shall have complete legal immunity in regard thereto.*" (Emphasis supplied).

The West Virginia immunity statute has been unreasonably restricted in the case at bar and fails to

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[2]The West Virginia Supreme Court of Appeals illogically noted that Code, 57-5-2, is narrower than most states' immunity statutes in spite of the West Virginia language prohibiting "any proceeding".

give petitioner the required protections coextensive with the Fifth Amendment as mandated in the cases of *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892) and recently in *Kastigar* v. *U. S.*, 406 U. S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). Also, in light of the broad immunity grant by the statute together with assurances and promises made by various officials (Appendix E) it becomes clear that the petitioner was "trapped" into believing he enjoyed a privilege which, in fact, he did not receive.[3]

2.

Although the Court Below Conceded that the Federal Grand Jury Testimony was Entitled to the Same Type of Immunity as that Extended by the State, the Court Below Did Not Resolve the Federal Constitutional Questions Raised by the Petitioner in the Federal Court Proceeding, the Ethics Committee Proceeding and the Supreme Court of Appeals Hearing and thus Shifted the Burden of Proving his "Innocence" to the Petitioner Thereby Relieving the Respondent of its Legal Burden.

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[3]Attention is drawn to the following excerpts from various law enforcement officials' affidavits concerning their intended grant of immunity herein: (These affidavits are set forth in full in Appendix E.) ". . . nothing Mr. Graziani might say in an attempt to cooperate . . . would be used to harm him in any way, whether by means of state criminal prosecution, federal criminal prosecution, or other administrative action . . ." (Appendix, A-19). ". . . Definite promises were made to Mr. Graziani by the undersigned (prosecuting attorney) . . . that nothing said or furnished of any evidentiary nature by Mr. Graziani concerning state or United States crimes would be used against Mr. Graziani in any way, shape or form . . . That . . . no penalty or forfeiture or civil obligations would arise . . ." (Appendix, A-16, A-17).

The basic issue raised herein was initially raised in the Federal court proceeding instituted by the Ethics Committee to obtain the grand jury testimony of Philip Graziani, thereafter preserved in the Committee hearing via a motion to dismiss the proceedings and ultimately in the Court below in the answer and briefs filed on behalf of the petitioner. Stated briefly, the issue is whether a grant of compelled testimony immunity which, at the time it was granted, ostensibly included immunity from administrative proceedings based upon the same testimony would continue to render the recipient thereof immune in a subsequent disciplinary proceeding.

Although the only evidence used against Phil Graziani in the disciplinary proceeding was his own testimony given before the federal grand jury, as well as the testimony of Arthur J. Tarley, despite assurances that the Committee would consider only the testimony of Philip Graziani, it is uncontroverted that the federal grand jury testimony was given under the same grant of immunity and assurances made by the State officials.[4]

At page 7 of the opinion below, the Court, in stating that testimony given under a grant of immunity could be used in disbarment proceeding cited, *inter alia*, *The Florida Bar* v. *Massfeller*, (Fla.) 170 So. 2d 834, and further cited from the case at length on page 8 of the opinion.

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[4]There appears to be no disagreement that the State immunity extended to the federal proceedings as reflected by the State Court's adherence to *Murphy* v. *Waterfront Commission*, 378 U. S. 52, at page 10 of the opinion below. (Appendix, A-12).

While the instant case was pending in the Court below for decison the Florida Supreme Court decided the case of *State ex rel. Vining* v. *Florida Real Estate Commission*, 281, So. 2d 487, decided April 4, 1973, rehearing denied September 12, 1973. In that case a real estate broker was charged by the Florida Real Estate Commission with violations of the Real Estate License Law.[5] Under protest and not waiving any of his constitutional rights, Vining filed a sworn answer denying the charges as required by Florida Law and moved to quash the information, which was denied.

Vining then instituted a prohibition proceeding in the Florida Supreme Court attacking the statute requiring the filing of a sworn answer on the basis of the Fifth Amendment to the United States Constitution. The Real Estate Commission defended on the basis that the statute had been upheld in recent Florida cases in which the Court characterized the proceedings as "administrative" and not "criminal". However, the Court, at page 489 of the opinion, noted that the Fifth Amendment rights had been extended to proceedings "penal" in nature whether classified in the traditional sense or not, thereby bringing the reasoning of the earlier Florida cases into question. The Court, in granting the writ of prohibition, at page 491, stated:

> ". . . In succinct terms, it is our view that the right to remain silent applies not only to the traditional criminal case, but also to proceedings 'penal' in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood . . ."

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[5]The charges would have presumably subjected the licensee to criminal action in addition to serving as the basis of the disciplinary proceeding.

Thereafter, on October 10, 1973, the Florida Supreme Court decided the case of *Lurie* v. *Florida State Board of Dentistry*, 288 So.2d 223 (1973), rehearing denied February, 1974, which is directly in point. There Lurie, a dentist, was compelled to testify before a county grand jury in 1967 regarding alleged illegal transactions between himself and one Rosenbaum. The interrogation of Lurie not only involved charges which were then pending against Rosenbaum but also involved matters relating to the operation of a stolen car ring and Lurie's acquisition of two automobiles from Rosenbaum. One year later Lurie was charged in a criminal information and sought and was granted a writ of prohibition contending that he was " . . . immune from prosecution under section 932.29, F. S. 1967, which provided that a person could not be excused from testifying in certain prosecutions on the ground he might incriminate himself, but when he did so testify he could not be prosecuted or subjected to any penalty or forfeiture for on account of any transaction, matter or thing concerning which he may so testify . . ."[8]

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[8]The Court in *Lurie* also noted that while the prohibition case was pending, the Supreme Court, in *Headley* v. *Baron*, 228 So. 2d 281 overruled *Florida State Board of Architecture* v. *Seymour*, 62 So. 2d 1, which held that the statutory immunity from subjection to 'any penalty or forfeiture', was not limited to criminal prosecutions, but also provided immunity from revocation of professional license proceedings; that *Headley* had held that 'penalty or forfeiture' referred only to a criminal penalty and could not be used to immunize one against loss of a professional license in an administrative proceeding as a result of grand jury testimony.

On June 22, 1971, the Board of Dentistry filed a two count accusation against Lurie charging him with willful negligence and malpractice in the removal of a tooth and conspiracy and concealment of stolen cars. As here, Lurie filed a motion to dismiss contending, *inter alia*, that he was fully immune from any penalty or forfeiture for his alleged stolen car actions because of Section 932.29 and the mandate of the Intermediate Court of Appeals in the previous prohibition proceeding. The Board found Lurie guilty as charged and on August 21, 1971, revoked his license for one year on the malpractice charge and permanently on the concealing stolen automobile charge. Petitioner filed a petition for writ of certiorari with the District Court of Appeals which, in a per curiam decision without opinion, denied the petition on June 30, 1972. The Florida Supreme Court granted the petition for writ of certiorari on the basis of a conflict in cases dealing with the retrospective effect of case law.[7] However, in the process, the Court made the following significant observations:

> "We have re-examined the cases of *Headley* v. *Baron*, supra, and *Florida State Board of Architecture* v. *Seymour*, supra, in the light of the weight of judicial authority throughout the nation on the question of citizens' immunities from the imposition of penalties and forfeiture in administrative proceedings where they are compelled to testify before grand juries, prose-

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[7]The Court specifically noted, however, that the decision in *Lurie* rested ". . . not on retroactivity, but on reinstatement of the holding in *Seymour* and freely acknowledged that its "erroneous decision in (the Headley case) generated the related action below."

> cuting officers, or courts concerning matters or things which might incriminate them. We are convinced now that this Court was in error in overruling *Florida State Board of Architecture* v. *Seymour, supra.*" (Citing authorities).
>
> "Where testimony is so compelled the person (witness) testifying should have the benefit of immunity statutes or other protections afforded by law. As Justice Terrell pointed out in the *Seymour* case, the guarantee must be as broad as the constitutional guaranty. He also said for the *Seymour* court, 'a forfeiture is also a penalty and has to do with the loss of property, position or some other personal right' and, 'It is accordingly our view that a proceeding to revoke Appellee's certificate as an architect amounts to a prosecution to effect a penalty or forfeiture as contemplated by the (statute) . . .' "[8] (Emphasis in orignal).

The Court further observed that the immunity extended under Section 932.29 F. S. 1967 in surrender of the Fifth Amendment privilege was not " . . . divisible so that the prosecution vouchsafed thereunder is only from criminal prosecution . . ."[9] and again alluded to the *Seymour* opinion stating that:

> " '. . . Whether the prosecution penalty or forfeiture has to do with a civil or criminal

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[8]The Court also referred to *State ex rel. Vining* v. *Florida Real Estate Commisison*, 281 So. 2d 487, *supra.*

[9]The Court noted that the result could be ascertained from a cursory reading of the statute that ". . . *no person shall be* prosecuted or *subjected to any penalty or forfeiture* for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and *no testimony* so given or produced *shall be received against him upon any criminal investigation or proceeding.*" (Court's emphasis).

action is not material. The statute (932.29, F. S.) makes it applicable to both.' "

The Court continued:

> "Such an interpretation is not a strained construction of the legislature's enactment, but rather one which comports realistically and and honestly with the professed immunity grant. The State through its authorized officials in granting immunity to a witness acts totally for the State, including its licensing agencies. A professional state licensing board must respect the immunity granted similarly as must the prosecuting attorney. *To be efficacious in securing testimony of a citizen the immunity extended must be coextensive with all possible governmental penalties and forfeitures, criminal or civil. Persons holding professional licenses cannot be excepted from total immunity protection.*"[10] (Emphasis Supplied).

Quite apart from the application of the statute, the Florida Court also made the highly pertinent observation that:

> "Fifth Amendment freedoms are never lightly surrendered. Consequently, the state on its

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[10]This, of course, reflects the logic of *Spevak* v. *Klein*, 385 U. S. 511 (1967), where the Court noted that the United States Supreme Court had always accorded the privilege a liberal construction and that lawyers were not excepted therefrom; that ". . . lawyers also enjoy first-class citizenship" Id. 385 U. S. 511, at 516. Cf, the Court's opinion herein that *Spevak* merely held that an attorney could not be disbarred for refusing to produce documents. The Florida court, however, was of the opinion that *Spevak* meant much more.

> part should not be technically 'sharp' or narrow in honoring its immunity commitment. When it professes to extend total immunity by statute its judiciary should not circumscribe or hedge or renege in part its solemn promise with exceptions permitting imposition of certain penalties and forfeitures in adminstrative proceedings. To do so would not only debiltate the effectiveness of the immunity grant; it would also invariably serve to engender distrust for a state officer's promise. *Fundamental fairness dictates an open and aboveboard agreement between both parties, the state and the witness. No hypocrisy or pretense can be indulged in by the state to break so solemn a pledge when a witness is compelled to testify.*" (Emphasis supplied).

Applied to the instant case, it is not possible to distinguish or otherwise diminish the far-reaching effect of the *Lurie* case from the instant case. First, it must be emphasized that West Virginia Code, 57-5-2, is broad in granting immunity and preventing use of incriminating testimony ". . . in any proceeding taken . . ." and bestowing ". . . complete legal immunity in regard thereto." It is apparent that Code, 57-5-2, when given its "plain meaning" application, is more comprehensive than the Florida statute. Second, any deficiency in the statutory grant was undoubtedly supplied by the order of the Intermediate Court to the effect that Philip Graziani ". . . shall not be prosecuted or subjected to any penalties or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify and said testimony shall not be used as evidence in any proceeding against the said Philip Graziani in any Court

either State, Federal or otherwise".[11] (Appendix, A-15). Moreover, the opinion of the court below did not discuss the uncontroverted evidence of the investigatory and prosecutorial officers to the effect that nothing that Philip Graziani said ". . . would be used to harm him in any way, whether by means of state criminal prosecution, federal criminal prosecution or other administrative action . . .";[12] that nothing would be used in any way, shape or form and particularly no penalty or forfeiture or civil obligations would arise;[13] that nothing furnished would be used in any manner whatsoever and for any purpose;[14] etc. If for no other reason a writ should be granted in this case as a guideline for both law enforcement officials and lawyers representing professional and/or persons engaged in licensed occupations inasmuch as the decison herein has generated much confusion and frustration.[15]

It is also interesting to note that the dissenting judges in *Lurie* would apply the rationale of the Court's opinion in the instant case, i.e., lack of a

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[11]To further compound the injustice, the Ethics Committee allegedly relied solely upon the testimony of Phillip Graziani and admitted that it would not have had sufficient evidence to carry the burden of proving the charges in absence thereof. Adding thereto was the lower Court's conclusion that his testimony "clearly" showed that he ". . . was guilty of bribery and conspiracy to commit bribery", without benefit of trial by jury, confrontation, etc. (Appendix, A-12).

[12]Affidavit of John T. Coyne; Appendix A-19.

[13]Affidavit of Patrick Casey; Appendix A-16.

[14]Affidavit of Charles L. Hughes; Appendix A-22.

[15]Counsel for defendant herein has had several inquiries both from law enforcement officials and attorneys representing licensed persons since the release of this opinion.

vested right to practice a profession and an unyielding commitment to the proposition that immunity statutes apply solely to crimnal proceedings.[16] However, the majority, although not unaware of such authority, chose instead to apply the logic supported by the "weight of judicial authority throughout the nation" and candidly acknowledged the error in previous Florida cases decided contrary thereto. As pointed out in petitioner's argument below, the cases relied upon by the Committee and thereafter incorporated into the Court's opinion were antiquated and predicated upon the erroneous concept that a license to practice law was a mere "privilege" to which no constitutional guarantees applied.[17] Moreover, *In re Schwary* 51 Ill. 2d 334, 282 N. E. 2d 689 (1972), the only significant case of recent vintage cited in the Court's opinon below, is clearly distinguishable on the basis that the Illinois statute specifically granted immunity from *prosecution* as contrasted with Code, 57-5-2; and that Schwary's *trial* testimony was used against him.

It is respectfully submitted that the court below in its opinion, did not resolve the critical constitutional questions posed in the numerous federal cases cited by the petitioner which, as noted in *Lurie*, are ". . . never lightly surrendered." The instant case is of

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[16]In fact, the dissent devoted over three pages to *In re Rouss*, 221 N. Y. 81, 116 N. E. 782, which this Court also relied upon heavily in its opinion, at pages 7 and 10. The dissent was also concerned with the effect of the decision on the the Watergate situation.

[17]The dissent in *Lurie* quoted extensively from *In re Rouss*, *supra*, specifically noting that Justice Cardoza was of the opinion that ". . . there was no question of constitutional right . . ."

sufficient magnitude to require a more definitive exposition of these critical questions which, as observed by the dissent in *Lurie* " . . . in the shadow of Watergate . . . present . . . implications and consequences . . . impossible to calculate . . ." Surely, the quoted language of *In re Rouss, supra*, contained in the opinion below at page 7 that " . . . we will not declare, unless driven to it by sheer necessity, that a confessed criminal has been untrenched by the very confession of his guilt beyond the power of removal (from the Bar)" could not withstand scrutiny under the holdings of the United States Supreme Court and the better reasoned opinions such as *Lurie, supra.* Any fears which might influence a decison to the contrary were met and resolved in *Lurie* as follows:

> "There are those who would hyperbolically parade the horribles of felons disguised as physicians or lawyers preying on unsuspecting patients or clients under a cloak of governmental immunity. Such feared abuses and evils ordinarily never transpire because prosecuting officers exercise reasonable discrimination in granting statutory immunity. A certain degree of confidence must be placed in state attorneys and other officials by assuming they will not recklessly grant immunity to the extent of opening floodgates for great numbers of the unscrupulous to professionally victimize the public. *It is to be assumed that such officials will act so as to use this bargaining tool to the state's greatest advantage without appreciable victimization to the public. Were we to judicially narrow the scope of immunity, we would emasculate that advantage at a far greater expense to the citizenry than would otherwise occur — and in the process raise serious doubts*

as to the state's good faith."[18] (Emphasis Supplied).

Significant also to a proper disposition of the instant question is *Lefkowitz* v. *Turley*, decided by the United States Supreme Court on November 19, 1973, the full text of which is reported in 94 S.Ct. 316, ____ U.S. ____, (1973). In that case two architects licensed by the State of New York were summoned to testify before a grand jury investigating various charges of conspiracy, bribery and larceny. They refused to sign wavers of immunity and were excused. The District Attorney, as directed by law, notified various contracting authorities of their conduct calling attention to the disqualification statutes[19] and the architects instituted a proceeding asserting that the

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[18]As noted in the affidavit of John T. Coyne (Appendix, A-19) the evidence involved was given for the purpose of clearing up a situation that was destructive of the entire federal housing program in West Virginia; that ". . . this situation was not only not known but not even suspected at the time and but for Mr. Graziani's help it might still exist." See also, The Charleston Gazette, December 2, 1973, page 15-A, titled "Crackdown on Crime in FHA Working" under the by-line of Orr Kelly of the Washington Star News. The story noted that the "crackdown" has not only resulted in the indictment of 305 persons and 107 convictions, including James F. Haught, but also set a new and highly successful pattern for efforts to deal with similar white-collar crime in other federal programs, as reported by Justice Department officials. The dates in the article coincide with defendant's testimony herein and it is reasonable to assume that his testimony played a vital role in the "crackdown."

[19]New York Municipal law and Public Authority law required a clause in all contracts providing that upon refusal to sign a waiver the person would be disqualified from bidding, etc., on municipal contracts for five years and for cancellation of contracts.

provisions were violative of the Fifth Amendment. A three-judge court declared the provisions unconstitutional and the State appealed. The United States Supreme Court affirmed the judgment of the District Court.

In so doing the Court reiterated the traditional effect of the Fifth Amendment adding that:

> "... In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected *at least* against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant ..." (Emphasis supplied).

The Court continued:

> "Against this background, there is no room for urging that the Fifth Amendment privilege is inapplicable simply because the issue arises, as it does here, in the context of official inquiries into the job performance of a public contractor ..."
>
> "It is true that the State has a strong, legitimate interest in maintaining the integrity of its civil service and of its transactions with independent contractors furnishing a wide range of goods and services; and New York would have it that this interest is sufficiently strong to override the privilege. The suggestion is that the State should be able to interrogate employees and contractors about their job performance without regard to the Fifth Amendment, discharge those who refuse to answer or to waive the privilege by waiving the

> immunity they would otherwise be entitled to and to use any incriminating answer obtained in subsequent criminal prosecutions. *But claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well.*" (Emphasis supplied).

In the context of the gravity of the question involved herein it is also clear that the State, by and through the Ethics Committee and the court below, has an interest in the regulation of the practice of law and the qualifications of the members of the profession.[20] This interest, however, cannot be utilized to justify the action of the respondent in this case. Surely, in spite of any statutory interpretation involved herein, the Committee was bound by the order of the Intermediate Court of Kanawha County granting *complete* immunity to Philip Graziani and the uncontroverted assurances of state officials, which obviously affected the Committee's decision not to attempt to obtain the state grand jury testimony on the basis of an overriding interest but to pursue the federal grand jury testimony instead, which was given, however, under the same conditions. As noted in *Lurie*, *supra*, the State should not be technically "sharp" or narrow in honoring its immunity commitment as was done in the instant case. The basic unfairness becomes more apparant by noting that the "investigation" of the defendant could have been pursued in directions other than perhaps the most "expeditious" one of obtaining and relying solely upon the testimony of the defendant

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[20]Cf. *In re Griffiths*, 413 U. S. 717 (1973).

himself.[21] The actions employed in the instant case has and will generate much distrust in the functioning of law enforcement in general and will undoubtedly prompt many professional and other licensed persons to refuse to cooperate in any manner whatsoever at so costly a consequence.

3.

The Court Below Misconstrued the Petitioner's Contention to be that a Disbarment Proceeding Was Purely a "Criminal" Proceeding and Ostensibly Did Not Consider the Alternative Contentions Supported by a Number of Cases Cited by Petitioner that it is Not Necessary to Characterize the Nature of the Proceeding But to Look to the Effect Thereof when Determining the Applicability of the Constitutional Right Against Self-Incrimination.

The third point petitioner brings to the attention of this Court regards the nature of the consequences of disciplinary proceedings as they relate to immunity statutes. Therefore, assuming, *arguendo*, that immunity applies only to criminal proceedings against a person who has been compelled to testify, it is still logical to treat disbarments and disciplinary proceedings as criminal in nature for the purposes of applying a grant of immunity.

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[21]Throughout these protracted proceedings counsel for petitioner has been unable to obtain a plausible response to why the principals involved could not have been used by the Committee especially in view of the obvious rapport with the federal officials.

A disbarment, although designed to protect the public, is a punishment or penalty to be imposed upon the lawyer and, ". . . is of a criminal or quasi-criminal nature". *In re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *In re Ming*, 469 F. 2d 1352 (7th Cir. 1972); *Erdman* v. *Stevens*, 458 F. 2d 1205 (2d Cir. 1972).

In re Ruffalo involved various procedural due process violations during a state disbarment proceeding. The Supreme Court of the United States applied basic due process requirements to disbarments. *Ruffalo* had been charged with misconduct in his handling of Federal Employee's Liability Act cases. During the state disbarment hearing a new charge of misconduct was levied against Ruffalo, a charge based upon the testimony of a State Board's witness. The issue finally narrowed down to one concerning the defendant's constitutional right to notice of the charge and a hearing. The United States Supreme Court, in reversing defendant's disbarment, strongly stated that the defendant not only had a right to due process but also was to be afforded the constitutional rights as was any other defendant. Note the following language in *Ruffalo*:

> "*. . . Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process . . . These are adversary proceedings of a quasi-criminal nature* . . . The charge must be known before the proceedings commence. They became a trap when, after they are underway, the charges are amended on the basis of testimony of the accused . . . " (Citing *Ex parte Garland*, 4 Wall. 333, 380; *In re Oliver*, 333 U. S. 257, 273). (Emphasis supplied).

Cf. *In re Donegan*, 282 N. Y. 285, 26 N. E. 2d 260 (1940); *Furman* v. *State Bar of California*, 12 Cal. 2d 212, 82 P. 2d 12, (1938).

By no means is *Ruffalo* a restricted opinion confined to its own circumstances. The *Ruffalo* case has been cited numerous times in both federal and state court cases dealing with the nature of disciplinary proceedings and the constitutional guarantees afforded a defendant in such hearings. See, e.g., *In re Ming*, 469, F. 2d 1352 (7th Cir. 1972); *In re Fleck*, 419 2d 1040 (6th Cir. 1969); *Taylor* v. *Kentucky State Bar Association*, 424 F. 2d 478, 481 (6th Cir. 1970); *In re Stivers*, 292 N. E. 2d 804, 808 (Ind. 1973); *Committee on Professional Ethics and Grievances* v. *Johnson*, 447 F. 2d 169 (3rd Cir. 1971).

The underlying reasons for this Court's decision that disbarment proceedings are criminal or quasi-criminal in nature are clearly explained in *Erdmann* v. *Stevens*, 458 F. 2d 1205 wherein the Court noted:

> ". . . *in our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding.* A lawyer is not usually motivated solely by the prospect of monetary gain in seeking admission to the bar or in practicing his chosen profession. *However, it cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine . . .* Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment — loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and his client re-

> lations as well as adversely affect his ability to carry out his professional functions . . . *Undoubtedly these factors played a part in leading the Supreme Court (of the United States) to characterize disbarment proceedings as being 'of a quasi-criminal nature'* (citing *In re Ruffalo, supra*). (Emphasis supplied).
>
> ". . . the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights . . . a court may neither act arbitrarily with respect to those licensed by it nor otherwise violate their constitutional rights . . ." (Emphasis supplied).

The language in *Erdmann, supra*, is neither novel nor is it confined to modern application. The West Virginia Supreme Court of Appeals, in 1947, twenty-five years prior to the *Ruffalo* and *Erdmann* decisons, set clear precedent and applied the common sense approach to the nature of disbarment proceedings. Accordingly, in *In re Damron*, 131 W. Va. 66, 45 S. E. 2d 741 (1947), that Court, per Justice Haymond, held that:

> "The disbarment of an attorney from practicing in the court which orders it and the manifestly more severe action or annulling his license to practice his profession in all courts are fraught with grave disaster for him who experiences either misfortune. *Each takes from him his customary means of earning a living for himself and his dependants. Each deprives him of a valuable professional right or privilege and destroys his professional standing. Each removes him from the sphere of conduct for which by training and experience he is best fitted and forces him to seek a different kind of activity in which he is inexperienced and for*

> *which ordinarily he is not properly qualified. Even in other types of work the stigma of his past unfitness remains and operates as a handicap in his efforts to succeed . . .*" (Emphasis supplied).

Thus, it can be clearly seen that a disbarment proceeding has all the effect and consequences of a criminal prosecution. In fact, the very section of the State Bar Rules under which respondent herein proceeds refers to these proceedings as "prosecutions" and parties thereto as "the accused".

Petitioner does not deny that one purpose of any disbarment or disciplinary proceeding is to protect the public and the courts to a degree. However, as held in many cases, the defendant in such proceedings is entitled to the protections afforded by the Constitution of the United States. The true test of the nature of disciplinary proceedings lies not in the label attached to such hearings but rather the test should be one which measures the consequences and results of the final outcome upon the convicted defendant.

A disbarment is a drastic action and is punishment levied against the accused attorney in the strictest sense. In *Lantz* v. *The State Bar*, 212 Cal. 213, 298 Pac. 497 (1931), the California Supreme Court not only called disbarments a punishment but also spoke of their "deterrent" effect:

> ". . . In our opinion, this conduct of the petitioner clearly involved moral turpitude and dishonesty on his part. It would therefore, demand an order of disbarment were it not for certain mitigating circumstances which the evidence shows should, in fairness to all parties, be taken into consideration in *meeting out just*

> *punishment to the accused . . . petitioners conduct should mitigate the punishment which this court is vested with the power to mete out to him.*
>
> "Under all of the facts and circumstances of this case, we do not feel justified in imposing upon him the extreme measure of our power and to deprive him permanently of his right to practice law. *We are satisfied that a lesser punishment would more justly meet the situation . . . we have decided that a years' suspension of the petitioner from the practice of law would be adequate punishment to be inflicted upon him, and will be a sufficient deterrent to others who might in the future be tempted to commit similar transgressions.*" (Emphasis supplied).

The only logical extension of these cases leads to the conclusion that the petitioner herein is immune from any disciplinary proceedings against him which are based upon compelled testimony before the grand juries. West Virginia Code, 57-5-2, prohibits the use of compelled testimony, which tends to criminate the witness, in "any proceeding against him." Standing alone, Code 57-5-2, would bar a disciplinary proceeding.

In re Ming, 469 F 2d 1352, questioned whether or not a disciplinary proceeding, grounded upon an attorney's conviction of a crime could be instituted prior to the exhaustion of defendant's appeal attempts. The Court in *Ming* cited *In re Ruffalo*, 390 U.S. 544, as controlling the defendant's right to constitutional due process. In concluding that a disbarment is a punishment or penalty imposed upon a lawyer the court went on to state the reason why due process must be afforded attorneys in these proceedings:

> "... *licenses to practice law ... can be viewed as a type of 'new property'* ... the deprivation of which has drastic consequences to the individual. It is only fair and just that the Government not subject any person to such a drastic divestment without affording him *substantial due process of law* ..." (Emphasis supplied).

Cf. Reich, *The New Property*, 73 Yale L. J. 733 (1964).

Simply stated, the petitioner herein should not have been prosecuted in this proceeding since he is immune from any prosecution based upon his compelled testimony. The nature of a disciplinary action prosecuted against an attorney is by its own consequences a "criminal" procedure contemplated by immunity law.

"A disbarment proceeding is quasi-criminal in character and, although it is not essential that the guilt of the accused be established beyond a reasonable doubt, nevertheless his guilt must be established by convincing proof to a reasonable certainty." *Furman* v. *State Bar of California, supra.* Thus, it can be clearly seen that even within the confines of the rules of "evidentiary weight", disbarment proceedings smack of criminal requirements as to the sufficiency of evidence. Note the following language from a recent West Virginia case:

> "In order to sustain a disciplinary charge against an attorney the evidence must be full, preponderating and clear ... It is also true that all proper intendments are in favor of the attorney, and *reasonable doubts or conflicts in the evidence should be resolved in his favor ...*" *The Committee on Legal Ethics of the W. Va.*

State Bar v. *Lewis*, ____ W. Va. ____, 197 S. E. 2d 312 (1973). (Emphasis supplied.)

These are criminal requirements not comparable to the "preponderation only" test used in civil cases. Again, it is apparent that the nature of disciplinary hearings, being criminal in character, cannot be hidden beneath generalized statements labeling them "civil". For decades, courts in this country were labeling juvenile proceedings as "civil"; however, in recent years the Supreme Court of the United States and the West Virginia Supreme Court of Appeals have adopted the common sense approach which recognizes the adversary character and obvious criminal consequences of such proceedings. *Cf. In Re Gault*, 387 U. S. 1, 33, 87 S. Ct. 1428, 1446, 18 L. Ed. 2d 527, (1966). Thus, the loss of a professional right, reputation and ability to earn a living demonstrate beyond a doubt that disbarment is indeed a penalty not to be imposed without strict adherence to requirements of due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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